

**ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT**

IN THE MATTER OF:

KIRKPATRICK CONCRETE INC.
2909 THIRD AVENUE NORTH
BIRMINGHAM, ALABAMA

GENERAL NPDES PERMIT ALG11-0109)

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CONSENT ORDER NO. 09-XXX-CWP

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter "the Department") and Kirkpatrick Concrete Inc. (hereinafter the "Permittee") pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.), the Alabama Water Pollution Control Act, Ala. Code §§ 22-22-1 to 22-22-14, (2006 Rplc. Vol.); the ADEM Administrative Code of Regulations (hereinafter "ADEM Admin. Code r.") promulgated pursuant thereto, and § 402 of the Federal Water Pollution Control Act, 33 U.S.C. § 1342.

STIPULATIONS

1. The Permittee operates a ready mix concrete facility (hereinafter the "Facility") located at 2909 Third Avenue North in the City of Birmingham, Jefferson County, Alabama. The Facility discharges pollutants from a permitted source via an unnamed tributary to Village Creek, a water of the state.

2. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.).

3. Pursuant to Ala. Code § 22-22A-4(n) (2006 Rplc. Vol.), the Department is the state agency responsible for the promulgation and enforcement of water pollution control regulations in accordance with the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 to

1387. In addition, the Department is authorized to administer and enforce the provisions of the Alabama Water Pollution Control Act, Ala. Code §§ 22-22-1 to 22-22-14 (2006 Rplc. Vol.).

4. On January 1, 1993, the Department issued the Permittee a National Pollutant Discharge Elimination System Permit Number ALG11-0109 (hereinafter "the Permit"), effective January 1, 1993. Since the original 1993 issuance of the Permit, the Permit has been reissued several times, most recently on August 22, 2007 with an effective date of September 1, 2007. The Permit establishes limitations on the discharge of pollutants from such point sources, designated therein as outfall numbers DSN002-1, DSN008-1 and DSN0012-1 (listed in the 2002-2007 permit as DSN001-1 and DSN009-1) via an unnamed tributary to Village Creek. The Permit requires that the Permittee monitor its discharges and submit Discharge Monitoring Reports (hereinafter "DMRs") to the Department describing the results of the monitoring. The Permit also requires that the Permittee maintain in good working order all systems used by the Permittee to achieve compliance with the terms and conditions of the Permit, and it also requires the documentation and implementation of a Best Management Practices (hereinafter "BMP") plan.

5. On March 13, 2008, the Department was notified that the Facility was discharging process water with a pH reading in exceedance of its permit limit. Subsequently, on March 13, 2008, the Department's Field Operations Division conducted an investigation at the Facility. At the time of the investigation, the Facility was discharging process water from Outfall DSN012-1. The discharge was clear and appeared free of visible solids and oil sheen; however, there was evidence that past cementitious discharges had occurred. Samples were collected for analysis. The unnamed tributary to Village Creek which receives the Facility's process water was also filled with cementitious material. The tributary is approximately 0.25 miles in length where it enters a city storm drain then goes underground.

6. On March 31, 2008, the Department received the analytical results from the March 13, 2008 investigation. Total Suspended Solids (hereinafter "TSS") were reported as 101 milligrams per liter which exceeded the permit limit of 50 milligrams per liter. Also, the

pH reading was reported as 12.12 standard units which exceeded the permit limit of 8.5 standard units/daily maximum.

7. On February 20, 2009, the Department and the Environmental Protection Agency (EPA) conducted an inspection of the Facility. At the time of the inspection, an unpermitted discharge of truck wash water was observed. Totes of muratic acid were also found to be uncovered and exposed. Also, the Facility was not maintaining at the site adequate laboratory records for three complete years as required by the General NPDES Permit. The laboratory records did not include the sample date, time and location, analyses date and time, the Standard Methods/EPA Approved Analytical Methods Used, analyst and lab equipment calibration and maintenance records. The Facility is monitoring the pH more than required by the permit, but has failed to report the additional testing on the DMR.

8. Based on the February 20, 2009, inspection, a Compliance Evaluation (hereinafter "CE") was completed. The CE determined that DMRs submitted to the Department indicated the Facility had discharged process water in violation of the daily minimum (pH 6.0 standard units) and daily maximum (8.5 standard units) permit limits. The daily maximum limit for Total Phosphorous (As P) is 1.0 milligrams per liter and the daily maximum permit limit for TSS 50 milligrams per liter (Outfalls DSN001-1 and DSN009-1 and DSN012-1), and 70 milligrams per liter (Outfall DSN001-1), respectively. The DMRs indicate the following:

DMR MONITORING PERIOD	OUTFALL#	PERMIT LIMIT (pH and TSS Daily Maximum) (* indicates pH Daily Minimum)	REPORTED VIOLATIONS (pH and TSS Daily Maximum) (* indicates Daily Minimum Violation)
November 2008	DSN012-1	8.5 s.u .	11.0 s.u.
September 2008	DSN012-1	8.5 s.u – 1.0 mg/l.	9.0 s.u – 5.0 mg/l.
July 2008	DSN012-1	8.5 s.u.	9.0 s.u.
June 2008	DSN012-1	8.5 s.u.	10.05 s.u.
May 2008	DSN012-1	8.5 s.u.	11.42 s.u.
April 2008	DSN01201	50 mg/l	59 mg/l
March 2008	DSN012-1	8.5. s.u.	10.35 s. u.
February 2008	DSN012-1	8.5 s. u.	11.6 s. u.
December 2007	DSN012-1	6.0 s.u. *	3.54 s.u. *
November 2007	DSN012-1	6.0 s.u. *	4.87 s.u. *
October 2007	DSN012-1	6.0 s.u. *	5.54 s.u. *
June 2007	DSN009-1	8.5 s.u. – 50 mg/l	Failed to report pH and TSS
March 2007	DSN009-1	8.5 s.u. – 50 mg/l	8.93 s.u. – 107 mg/l
February 2007	DSN009-1	8.5 s.u. – 50 mg/l	Failed to report pH and TSS
May 2007	DSN001-1	8.5 s.u.	9.42 s.u.
March 2007	DSN001-1	8.5 s.u. - 70.0 mg/l	8.93 s.u. -107 mg/l
December 2006	DSN009-1	8.5 s.u.	9.09 s.u.
September 2006	DSN009-1	8.5 s.u.	9.15 s.u.
December 2006	DSN001-1	8.5 s.u.	9.09 s.u.
September 2006	DSN001-1	8.5 s.u.	9.15 s.u.

9. The CE also determined that the DMRs were not signed by the Principal Executive Officer, Bart Moore, President of the Facility.

CONTENTIONS

Pursuant to Ala. Code § 22-22A-5(18)c (2006 Rplc. Vol.), in determining the amount of any penalty, the Department must give consideration to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by the Permittee; the economic benefit which delayed compliance may confer upon the Permittee; the nature, extent and degree of success of the Permittee's efforts to minimize or mitigate the effects of such violation upon the environment; the Permittee's history of previous violations; and the ability of the Permittee to pay such penalty. Any civil penalty assessed pursuant to this authority shall not be less than \$100.00 or exceed \$25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not exceed \$250,000.00. Each day such violation continues shall be a separate violation. In arriving at this civil penalty, the Department has considered the following:

A. **SERIOUSNESS OF THE VIOLATION:** The Permittee violated conditions of the Permit by discharging process water that violated the daily maximum and daily minimum permit limits for pH, by discharging process water that exceeded the daily maximum permit limit for TSS, and by failing to report a value for pH and TSS during two monitoring periods. The Department has no evidence of irreparable harm to the environment or any threat to the health and safety of the public as a result of these violations.

B. **THE STANDARD OF CARE:** The Permittee failed to achieve compliance with the terms and conditions of the Permit by discharging process water in violation of established limits.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: The Department has been unable to ascertain if there has been a significant economic benefit conferred by the delay of compliance with permit limitations.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION UPON THE ENVIRONMENT: The Department is not aware of any efforts made by the Permittee to minimize or mitigate the effects upon the environment.

E. HISTORY OF PREVIOUS VIOLATIONS: The Permittee has had violations of a similar nature prior to the violations cited in this Order.

F. THE ABILITY TO PAY: The facility has not alleged an inability to pay the civil penalty.

The Department has carefully considered the six statutory penalty factors enumerated in Ala. Code § 22-22A-5(18)c (2006 Rplc. Vol.), as well as the need for timely and effective enforcement and concludes that the penalty amount is appropriate and consistent with the historical penalty range imposed by the Department for similar violations.

ORDER

THEREFORE, the Permittee, along with the Department, desires to resolve and settle the compliance issues cited above. The Department has carefully considered the facts available to it and has considered the six penalty factors enumerated in Ala. Code § 22-22A-5(18)c (2006 Rplc. Vol.), as well as the need for timely and effective enforcement, and the Department believes that the following conditions are appropriate to address the violations cited herein. Therefore, the Department and the Permittee agree to enter into this CONSENT ORDER with the following terms and conditions:

A. The Permittee agrees to pay to the Department a civil penalty in the amount of \$10,600.00 for the violations stated herein. Failure to pay the civil penalty within forty-five

days from the effective date may result in the Department's filing a civil action in the Circuit Court of Montgomery County to recover the civil penalty.

B. The Permittee agrees that all penalties due pursuant to this Order shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check and shall be remitted to:

Office of General Counsel
Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, Alabama 36130-1463

C. The Permittee agrees to prepare and submit to the Department a complete application for enrollment in the Department's Electronic Environmental DMR Reporting System Program (hereinafter, "E2 Program"), not later than 30 days after the effective date of this Consent Order. If the Department determines through its review of the submitted application that the submittal is not sufficient for the Permittee to participate in the E2 Program, then the Permittee must modify the application so that it is sufficient. Modifications to the application, if required, shall be submitted to the Department no later than 14 days after receipt of the Department's comments. Upon acceptance by the Department into the E2 Program, the Permittee agrees to begin the electronic submittals of DMRs through the E2 Program no later than the 28th day of the month following the first complete monitoring period. The Permittee agrees to fully implement all aspects of the E2 Program including the cessation of federal paper DMR submittals, if applicable, no later than 180 days after acceptance into the E2 Program, unless an extension is granted in writing by the Department. The Permittee further agrees to abide by all terms, conditions, and limitations of the E2 Program immediately upon acceptance into the E2 Program.

D. The Permittee agrees to prepare and submit to the Department, no later than thirty days after the effective date of this Order; an Engineering Report that includes a schedule for implementation (i.e., a Compliance Plan) and that identifies all potential causes of noncompliance. The plan shall address the remediation of cementitious material in the ditch behind the facility and the unnamed tributary to Village Creek. The report must summarize

the Permittee's investigation of the changes necessary for the Permittee to implement to achieve compliance with Permit ALG 11-0109. At a minimum, the Permittee shall consider each of the following in making its determination: the need for changes in maintenance and operating procedures; the need for modification of existing capture and collection system components; and the need for new or additional captures works and collection system components. The Engineering Report shall be prepared by a professional engineer licensed to practice in the State of Alabama. If the Department determines through its review of the submitted Engineering Report that the report is not sufficient to accomplish compliance with the Permit, then the Permittee shall modify the report so that it does accomplish compliance. Modifications to the Engineering Report, if required, shall be submitted to the Department no later than thirty days after receipt of the Department's comments. The Permittee shall complete implementation of the recommendations made in the Engineering Report within 180 days of the effective date of this Order.

E. The Permittee agrees that, after the effective date of this Consent Order, it will pay stipulated civil penalties for each day it fails to meet any of the milestone dates or to satisfy any of the requirements set forth in or established by paragraphs A, B, C, and D contained herein. The stipulated civil penalties for failure to meet each milestone outlined herein or for failure to meet any milestone date presented in the accepted Compliance Plan or any other requirement date, except for *Force Majeure* acts hereinafter defined as acts that occur beyond the Permittee's control, shall be as follows:

Period of Noncompliance	Penalty per Day per Violation
1st to 30th day	\$ 100.00
31st to 60th day	\$ 200.00
After 60 days	\$ 300.00

If the Permittee fails to meet any milestone or any assigned date for a period of ninety days after any required date described in paragraphs A, B, C, and D, then the Department reserves the right to file a new action against the Permittee.

F. The parties agree that the cumulative stipulated penalties described in

paragraph E above shall under no circumstances exceed \$12,000.00. Once stipulated penalties of \$12,000.00 are due to the Department and violations continue to occur, or, should violations continue to occur 365 days after the effective date of this Consent Order, then the Department shall be free to issue additional orders or to file suit against the Permittee in the Circuit Court of Montgomery County or in another court of competent jurisdiction to enforce compliance of this Consent Order.

G. The Permittee agrees that payment of stipulated penalties due for any violations stated herein shall be due not later than the 28th day of the month following the monitoring period in which there were violations. Notification to the Permittee by the Department of the assessment of any stipulated penalty is not required.

H. The parties agree that this Consent Order shall apply to and be binding upon both parties, their directors, officers, and all persons or entities acting under or for them. Each signatory to this Consent Order certifies that he or she is fully authorized by the party he or she represents to enter into the terms and conditions of this Consent Order, to execute the Consent Order on behalf of the party represented, and to legally bind such party.

I. The parties agree that, subject to the terms of these presents and subject to provisions otherwise provided by statute, this Consent Order is intended to operate as a full resolution of the violations, which are cited in this Consent Order.

J. The Permittee agrees that it is not relieved from any liability if it fails to comply with any provision of this Consent Order.

K. For purposes of this Consent Order only, the Permittee agrees that the Department may properly bring an action to compel compliance with the terms and conditions contained herein in the Circuit Court of Montgomery County. The Permittee also agrees that in any action brought by the Department to compel compliance with the terms of this Agreement, the Permittee shall be limited to the defenses of *Force Majeure*, compliance with this Agreement and physical impossibility. A *Force Majeure* is defined as any event arising from causes that are not foreseeable and that are beyond the reasonable control of the Permittee, including its contractors and consultants, that could not be overcome by due diligence (i.e., causes that

could have been overcome or avoided by the exercise of due diligence will not be considered to have been beyond the reasonable control of the Permittee) and which delays or prevents performance by a date required by the Consent Order. Events such as unanticipated or increased costs of performance, changed economic circumstances, normal precipitation events, or failure to obtain federal, state, or local permits shall not constitute *Force Majeure*. Any request for a modification of a deadline must be accompanied by the reasons (including documentation) for each extension and the proposed extension time. This information shall be submitted to the Department a minimum of ten working days prior to the original anticipated completion date. If the Department, after review of the extension request, finds the work was delayed because of conditions beyond the control and without the fault of the Permittee, the Department may extend the time as justified by the circumstances. The Department may also grant any other additional time extension as justified by the circumstances, but it is not obligated to do so.

L. The Department and the Permittee agree that the sole purpose of this Consent Order is to resolve and dispose of all allegations and contentions stated herein concerning the factual circumstances referenced herein. Should additional facts and circumstances be discovered in the future concerning the facility that would constitute possible violations not addressed in this Consent Order, then such future violations may be addressed by other Orders as may be issued by the Director, by litigation initiated by the Department, or by such other enforcement action as may be appropriate, and the Permittee shall not object to such future orders, litigation or enforcement action based on the issuance of this Consent Order if future orders, litigation or other enforcement action address new matters not raised in this Consent Order.

M. The Department and the Permittee agree that this Consent Order shall be considered final and effective immediately upon signature of all parties. This Consent Order shall not be appealable, and the Permittee does hereby waive any hearing on the terms and conditions of same.

N. The Department and the Permittee agree that this Consent Order shall not affect the Permittee's obligation to comply with any Federal, State, or local laws or regulations.

O. The Department and the Permittee agree that final approval and entry into this Consent Order is subject to the requirement that the Department provide notice of proposed Orders to the public, and that the public have at least thirty days within which to comment on the Consent Order.

P. The Department and the Permittee agree that, should any provision of this Consent Order be declared by a court of competent jurisdiction or by the Environmental Management Commission to be inconsistent with Federal or State law and therefore unenforceable, the remaining provisions hereof shall remain in full force and effect.

Q. The Department and the Permittee agree that any modifications of this Consent Order must be agreed to in writing signed by both parties.

R. The Department and the Permittee agree that, except as otherwise set forth herein, this Consent Order is not and shall not be interpreted to be a permit or modification of an existing permit under Federal, State or local law, and shall not be construed to waive or relieve the Permittee of its obligations to comply in the future with any permit.

Executed in duplicate, with each part being an original.

KIRKPATRICK CONCRETE INC.

**ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT**

By: _____

John More

By: _____

Its: _____

PRESIDENT

Its: _____

Date: _____

7/27/09

Date: _____